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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN,
JERALD R. JAKL, LARRY R. JOHNSON,
ANTHONY T. PELLEGRINO,
Petitioners,

VS.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is there an exception to the rule that separate corporations affiliated by common ownership have ability to conspire in violation of the Sherman Act?

2. Assuming characterization of three separate economic entities as a "common enterprise", does said characterization exempt from the Sherman Act an agreement between the member companies to restrain competition in markets in which defendants are actual or putative competitors?

3. Are agreements to blacklist and to boycott natural persons from employment opportunities the type of agreements prohibited by section 1 of the Sherman Act?

4. Do natural persons who are the intended victims of employer agreements to blacklist and to boycott have standing to sue their employer for enlisting said agreements for the purpose of excluding competition in the separate, related market in which the victims' services are sold by the employer?

PARTIES

The names of the parties to the action in this Court are the same as stated in the caption.

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James M. Thomsen, Travis Gatus, John M. Brennan, Jerald R. Jakl, Larry R. Johnson, Anthony T. Pellegrino, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, which was entered on March 30, 1981 is reported at 512 F.Supp. 128 and is attached to this Petition as Appendix A. The opinion of the

United States Court of Appeals for the Ninth Circuit, attached as Appendix B, is reported at .....F.2d....., No. 81-4190 (9th Cir., July 6, 1982).

JURISDICTION

The judgment of the Ninth Circuit was entered on July 6, 1982. A timely petition for rehearing and suggestion for rehearing en banc was filed on July 20, 1982, and was denied by the Ninth Circuit in an order dated August 17, 1982, attached as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 1981), attached as Appendix D, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any person, one hundred thousand dollars or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1981 Supp.), attached as Appendix E, states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire to with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on

> conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. 1981), attached as Appendix F, provides in relevant part as follows:

> Any person who shall be injured in his business of property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioners brought this antitrust action in the United States District Court for the Northern District of California in September 1979, and alleged that Western Electric Co., Inc. (Western Electric) The Pacific Telephone and Telegraph Company (Pacific Telephone or Pacific) and American Telephone and Telegraph Company (A.T.&T.) conspired to blacklist and exclude them from employment opportunities at Pacific Telephone in violation of Section 1 of the Sherman Act (R. 1-13). Petitioners alleged that their common employer, Western Electric, enlisted agreements to boycott with their prospective employer, Pacific Telephone, in violation of attempt to monopolize and monopolization provisions of Section 2 of the Sherman Act (R. 5).

A. The Parties

Petitioners are telecommunications craftsmen, and have practiced their craft for eight to fifteen years. (R. 1190-

1200; 1235-38; 1243-72). All began their occupations as employees of Western Electric. (*Id.*).

Western Electric is a corporation organized and existing under the laws of the state of New York (R. 1279). Western Electric is one of the largest industrial organizations in the United States and was ranked seventeenth on the *1979 Fortune 500 List of the Largest Industrial, Financial Institutions in the United States* (R. 1281-82). It owns seven subsidiary corporations (R. 1278-79). Western Electric is a wholly-owned subsidiary of A.T.&T. (R. 2). Its affairs are managed by its Board of Directors which has no members from either A.T.&T. or Pacific Telephone (R. 1283; 1288).

In Northern California, Western Electric sells, as a labor contractor, services for the installation and maintenance of telephone equipment of its own manufacture as well as its competition (R. 1290-92). Services are sold by hourly, per capita fees (R. 1490-97). These specialized services have been marketed and sold to General Telephone, United States Government, A.T.&T., Pacific Telephone and Central Telephone in Nevada (R. 1290; 1303-04). Western Electric employs 1250 individuals to perform the telecommunication services in Northern California (R. 1297).

By its own admission, Western Electric operates with complete autonomy in its installation line of business and in employment matters (R. 1290; 1312-13). A.T.&T. has issued no directives with respect to either of these activities since 1972 (R. 1308).

Pacific Telephone is a corporation organized and existing under California law (R. 2-3). During the time period at issue, A.T.&T. owned 90.11 percent of its common stock

and 11.0 percent of preferred stock (R. 1333-34; 1368). Pacific Telephone stock was publicly traded on the New York Stock Exchange (R. 1348). The largest private employer in California, Pacific employs craftspersons to install, test and maintain telephone equipment (R. 1349-50).

Pacific Telephone paid a fixed percentage of gross revenues to A.T.&T. in exchange for A.T.&T.'s advisory services pursuant to "license contracts" (R. 1334, 1368). Pacific is free to accept, modify or reject A.T.&T.'s advice (R. 1166-67). Company policies are established by Pacific's Board of Directors (R. 1352), which is composed of fourteen individuals from other organizations in California and one officer of A.T.&T. (R. 1335, 1346).

A.T.&T. is a New York corporation (R. 3). In addition to its sale of advisory services to Pacific Telephone and other telephone operating companies, A.T.&T. owns and operates long distance telephone lines (R. 1335-36). A.T.&T. employs craftspersons to maintain this equipment (R. 1335). No officer, director or employee of Pacific Telephone is a member of its Board of Directors; Donald Procknow, Western Electric's president, is a member. (R. 1387-88).

B. Competitive Conditions

The telecommunications industry in Northern California is divided into two segments: (1) regulated segment in which Pacific and other telephone companies possess exclusive monopoly rights to dial tone services in designated geographic areas and (2) unregulated segment encompassing both sale of inter-city long distance service and sale and/or lease of business telephone equipment, e.g., private branch exchange equipment (R. 1336-39). Pacific

possesses at least ninety percent market share in both segments in the Northern California area (R. 1407; 1426-27).

Western Electric has been the exclusive outside contractor for telecommunications services to Pacific Telephone in the Northern California area, thereby realizing over 94 million dollars in annual revenues (R. 1478-79). Pacific Telephone refused to deal with Western's competitors on the basis that Western Electric's prices for the services were lower (R. 1502). The key to Western's maintenance of lower prices is its retention of a large population of skilled craftspersons. Experienced craftspersons usually complete work more efficiently and profitably, and per capital cost of training replacements is estimated at $30,000 (R. 1449; 1452-3; 1456-57; 1460-61).

As a result of Pacific's dominant buying power and Western's exclusive relationship with Pacific, these defendants controlled more than ninety-five percent of the employment market for the services of skilled telecommunications craftspersons in Northern California (R. 1130, 1296-97, 1405, 1816).

By their own admissions, Western Electric and Pacific compete against each other in the sale of services for installation and maintenance of both business telecommunications equipment and central office equipment (R. 1445; 1516; 1536-38; 1513-17; 1540; 1579; 1584).

In 1978, Pacific experienced a critical shortage of skilled craftspersons necessary to meet burgeoning services and equipment demand (R. 1706; 1717-20). Pacific recruited skilled craftspersons employed by Western Electric to meet that demand (R. 1584). The blacklisting and other

restraints here in dispute arose to eliminate actual and potential competition between Western Electric and Pacific Telephone for the services of petitioners and other skilled telecommunications craftspersons (R. 1767-69; 1579-83; 1778-82; 1273; 1616-17).

C. Blacklisting Agreements and Boycotts of Plaintiffs

Petitioners were required to deal with Pacific Telephone as a separate entity. Pacific's policy was to treat employees of Western Electric as "someone off the street" (R. 1374-1378). There was no inter-company transfer procedure (R. 1331).

Under Pacific Telephone's stated company policy, petitioners' employment with Western Electric was irrelevant; Western crafts employees were to be hired if "best qualified". (R. 1311-13; 1363; 1400; 1757; 1584-87; 1756-59.)

On March 7, 1978, Mr. Pellegrino was found, through usual pre-employment testing, "best qualified" and was offered employment as a PBX repair technician by Pacific Telephone in Santa Clara, California (R. 1259-72). Mr. Pellegrino accepted Pacific's offer (R. 1259-72; 1584-87). He gave notice of termination to Western Electric (R. 1767-69). On March 17, 1978, a Western installation manager contacted Pacific and threatened to stop "loaning" personnel unless Pacific cancelled its employment contract with Mr. Pellegrino (R. 1579-83). A Pacific employment manager then telephoned Mr. Pellegrino, cancelled the employment contract, and told Mr. Pellegrino that there was an "agreement" between Western and Pacific whereby Pacific would not hire individuals employed by Western unless the employee resigned from Western Electric and waited six months (R. 1584-96).

Mr. Johnson's effort to obtain employment with Pacific Telephone followed a similar scenario. After passing the gamut of pre-employment testing, Pacific denied employment by reason of the "six months policy" on July 23, 1978 (R. 1252-55).

In September 1978, Pacific requested advice from ATT regarding policy in hiring or not hiring Western employees (R. 1756-59). ATT recommended Pacific hire if the individuals were the "best qualified" (R. 1756-59; 1584-87). Pacific then recruited skilled craftspersons employed by Western and made employment offers (R. 1584-87). At this time, the other petitioners, Messrs. Thomsen, Gatus, Brennan and Jakl, successfully completed all pre-requisites to employment (R. 1192-1200; 1217-34; 1235-36; 1239-42; 1243-47).

Western Electric's local installation managers discovered Pacific's recruiting and received letters of resignation from skilled craftsmen within its employ (R. 1584-87). With the specific intent to "prevent ongoing recruiting and the loss of skilled installers." (R. 1584-87), Western Electric threatened Pacific with a "raiding war" unless Pacific agreed to stop its recruiting of and employment offers to Western Electric employees (R. 990; 1805-08).

Pacific Telephone again capitulated to threats. Pacific and Western Electric agreed no *current* Western employee would be hired by Pacific without Western first agreeing to "release" the individual from its employ. It was further agreed *former* Western employees would be eligible for employment with Pacific Telephone only after six months expired from the date of separation from Western Electric (R. 1752; 1588). Within 15 days, the "release" device was

replaced by Pacific Telephone's categorical refusal to deal with all individuals presently employed by Western Electric (R. 1756).

Pacific Telephone told plaintiffs that it had no duty to hire even after expiration of the required six months (R. 1645-47). Pacific appreciated individual wage earners could not afford to be without work in their chosen trade for six months (R. 1760; 1765-55).

Western Electric and Pacific Telephone have admitted the restraints at issue to be without redeeming value. Western Electric's documents admitted the restraints are "blacklisting" and contrary to an individual's right to freely pursue employment opportunities (R. 1637; 1634-35). Pacific admitted it was "blacklisting" Mr. Pellegrino (R. 1271-72). Pacific also admitted the six months' lapse to be "invalid", "illegal", and "inconsistent" with Pacific's employment policies (R. 1352, 1634, 1635, 1638-41; 1624-33; 1356-57).

On their face, the restraints have operated to prevent Pacific Telephone from recruiting, negotiating with, or contracting with skilled craftspersons employed by Western Electric (R. 1756; 1584-87; 1559-70; 1579-83; 1617-1633; 1653-1724). In actual effect, petitioners and the 1243 other skilled craftspersons on Western's payroll have been foreclosed from marketing or selling their services in 95 percent of the market (R. 1193-97; 1239-42; 1252-55; 1390-93; 1579-96; 1624-44; 1648-52; 1725-27). By binding plaintiffs and skilled craftsmen to exclusive service, Western Electric has maintained per capita productivity, quality of installation and avoided cost increases and resulting prices increases (R. 1383-86; 1405-09; 1419-31; 1436-67; 1475-76; 1489-1500; 1506-07; 1512-33).

Separate collective bargaining agreements have been entered into by Western Electric, Pacific Telephone and ATT (R. 461-515; 965). The restraints at issue have never been covered by any collective bargaining agreements (R. 461-515).

D. Decisions Below

Just prior to trial, after extensive discovery had been completed (including forty-one depositions), respondents moved for summary judgment contending (i) they lacked capacity to conspire, (ii) the restraints were merely "matters of internal management" among affiliated corporations and therefore exempt from conspiracy proscriptions of Sherman Act, § 1, (iii) all antitrust claims were barred by the labor exemption to antitrust laws and (iv) petitioners lacked standing to prosecute the attempt to monopolize and monopolization offenses against Western Electric since appellants were neither customers, suppliers or competition of Western Electric (R. 103-1102). Petitioners responded to all issues with a seventy-two page memorandum accompanied by one hundred twenty-three exhibits (R. 1107-1809).

The District Court sustained respondents' second contention and dismissed the Sherman Act § 1 claim, finding (1) "Pacific, A.T.&T. and Western are sufficiently affiliated to permit the further consideration of whether the challenged activities comprised matters of internal management" (512 F.Supp. at 132) and thereon (2) each restraint alleged was "an integral part of the operation of (Bell System) and is a legitimate concern of those who own and control it." (*Id.*) The District Court also adopted respondents' standing argument and held petitioners lacked standing on the § 2 claims on the ground they were not

competitors or customers of Western Electric (512 F.Supp. at 134).

On appeal, Judge Goodwin, speaking for a unanimous panel of the Ninth Court, affirmed the District Court's decision. The Court of Appeal announced a new test of liability for related corporations:

> "Even if appellees possessed capacity to conspire, the personnel agreements in question do not violate § 1 if the corporate entities are sufficiently affiliated for the matter to be one of internal management . . ." (App. B., p.10b.)

Applying its "internal management" test, the Court found the challenged agreements did "not involve anyone outside the corporate family" and therefore lacked anticompetitive effect as to a matter of law. (App. B., p.12b) In dicta, the court commented, "this case is essentially an effort to turn a labor dispute into an antitrust action for treble damages." (*Id.*)

Affirming summary judgment on the standing issue, the Ninth Circuit concluded plaintiffs' injury was remote and outside the target area since plaintiffs did not compete or purchase from Western (App. B., p.14b-15b). The Ninth Circuit also found lack of "causal connection" between monopolization and the blacklisting agreements in dispute. (App. B., p.15b-16b.)

REASONS FOR GRANTING THE WRIT

A. The Decision Contravenes Rules of Conspiracy of This Court Governing Separate Corporations Affiliated By Common Ownership or Control

Rule 17.1(c) of the Rules of this Court provide that one consideration in favor of granting the writ of certirorari

is that the decision below has "decided a federal question in a way in conflict with applicable decisions of this court."

In holding some level of affiliation, by ownership and control, operates to exempt separate corporations from the conspiracy provisions of § 1 of the Sherman Act, the decision below directly contravenes decisions of this Court. This court has squarely held that common ownership or even common control does *not* exempt separate corporations from the conspiracy prohibitions of the Sherman Act.

The principle was enunciated in *United States v. Yellow Cab*, 332 U.S. 218, 227 (1947) as follows:

> "The fact that these restraints occur in a setting described by appellees as a vertically does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form."

The decision in *Yellow Cab* was followed to summarily reject a "single trader" defense asserted in *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948).

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) this Court held that "common ownership and control does not liberate corporations from the impact of the antitrust laws." 340 U.S. at 215. In strik-

ing down a purported "single unit" defense, this Court upheld a jury's finding of price-fixing violations involving two commonly-owned liquor distributors. 340 U.S. at 213-214.

In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), this Court affirmed Sherman Act violations against commonly owned subsidiary companies who conspired to eliminate competition between themselves. The Court noted:

> "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. E.g., *Kiefer Stewart co. v. Seagram & Sons, supra*, 340 U.S. at page 215, 71 S.Ct. at page 262. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." 341 U.S. at 598.

The rule found clear expression in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142. Again rejecting the invitation to create a "single trader" immunity to Sherman Act conspiracy liability, this Court held:

> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); United States v. Yellow Cab. Co., 332 U.S. 218, 227, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947)." 392 U.S. at 141-142.

The rule applied by this Court that separate incorporations is sufficient to render affiliated corporations potential conspirators not only squares with statutory language of Sherman Act §§ 1 and 2, but also advances the purposes underlying federal antitrust laws. Under this criteria, judicial analysis is properly addressed to the competitive significance of conduct challenged, not the nature and extent of corporate interrelationships. *Nat. Society of Prof. Engineers v. United States, supra*, 435 U.S. 679, 692 (1978).

The decision below grants an immunity for concerted action intended by defendants to eliminate *all* competition in markets in which Western Electric and Pacific Telephone were, by their own admissions, actual or putative competitors, i.e., market for craftspersons' services, market for sale of telecommunications services. This ad hoc immunity for matters labelled "internal management" between affiliated corporate entities is in direct conflict with the long line of applicable decisions by this Court. The immunity postulates a label which precludes review of challenged restraints under *any* standard of Sherman Act analysis.

B. The Decision of the Ninth Circuit Directly Conflicts With Decisions of the Third and Fifth Circuits Concerning Ability of Commonly Owned Companies to Conspire In Violation of the Sherman Act

Rule 17.1(a) of the Rules of this Court states that another consideration in favor of granting the writ for certiorari is that the decision of the court below is "in conflict

with the decisions of another federal court of appeals on the same matters . . ." The decision here is in direct conflict with the decisions of the Third[1] and Fifth Circuits[2], as well as other circuits[3].

Following the decisions of this Court, the Third and Fifth Circuits have held prerequisites of conspiracy under § 1 of the Sherman Act are met by presence of two or more legally distinct corporations.

The holdings of the Third and Fifth Circuits, if applied to the facts in this case, would reverse the result reached by the Ninth Circuit. Once the element of conspiracy was met, judicial scrutiny would have addressed the nature and necessary effect of the challenged blacklisting agreements, and, if necessary, the history of the restraints, the market setting in which they occurred and the reasons why they were imposed. Governing standards of antitrust analysis would thus have been applied to assess the probable impact on competitive conditions. *Nat. Society of Prof. Engineers v. United States, supra,* 435 U.S. 479, at 692.

The extensive factual record presented by petitioners established the existence, nature, and necessary effect of each challenged agreement and their anticompetitive purpose, history and effects. Under the decisions of the Third

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[1] *Columbia Metals v. Kaiser Aluminum*, 579 F.2d 20, 33-34 (3d Cir. 1978), cert. denied, 439 U.S. 876 (1978); *Cromar Co. v. Nuclear Materials & Equip. Co.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975).

[2] *H & B Equipment Co., Inc. v. International Harvester*, 577 F.2d 239, 244-45 (5th Cir. 1978).

[3] *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) ("corporation may "conspire" within meaning of Sherman Act with subsidiaries if *held out* as distinct legal entities").

and Fifth Circuits, summary judgment would have been denied.

C. In Fashioning a "Common Enterprise" Exemption, the Decision Below Is In Conflict with a Recent Decision of the Second Circuit and Is Contrary to Decisions of this Court

The decision below also conflicts with the recent decision of the Second Circuit in *North American Soccer v. National Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982). Rejecting the NFL's assertion of single-enterprise exemption to Section 1 of the Sherman Act, the Second Circuit stated:

> "The characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. *North American Soccer v. National Football League, supra*, 670 F.2d at 1257.

In contrast, the decision below creates an exemption to the Sherman Act for agreements between separate corporations for the express purpose and effect of restraining competition in markets where they jointly possess ninety percent shares.

The decision below is also in direct conflict with the decisions of this Court in *Associated Press v. United States*, 326 U.S. 126 (1945) wherein this Court found AP's bylaws in restraint of trade; and *Silver v. New York Stock Exchange*, 373 U.S. 341, 356 (1963), wherein this Court held

that the Exchange alone had violated Section 1 of the Sherman Act.

D. The Decision of the Ninth Circuit is Contrary to Decisions of This Court and Is in Conflict with Decisions of The Sixth and Eighth Circuit Courts of Appeal as to Whether the Challenged Agreements Are Prohibited by Section 1 of the Sherman Act

The Ninth Circuit's conclusive presumptions of reasonableness once challenged restraints are classified as "matters of internal management" contravenes fundamental standards for analyzing restraints of trade under § 1 of the Sherman Act. This Court has mandated two inquiries be made: (1) are the challenged agreements, by their inherent character and necessary effect, anticompetitive on their face and therefore unlawful *per se;* and (2) whether the evidence of industry facts, the history of the restraints, their purpose and probable effects proves the restraints unduly restrictive of competitive conditions—unlawful under the rule of reason, *Nat. Society of Professional Engineers v. United States, supra,* 438 U.S. 679, 692.

The opinion below does not apply either per se or rule of reason analysis. No judicial review occurred concerning the face of any of the four agreements to determine inherent character and necessary effect. None of petitioners' evidence going to industry facts, the history, purpose and probable effects of defendants' agreements was even considered by either Court below, much less analyzed. The only evidence found relevant were six (6) items showing affiliation of the three corporate respondents.

The Ninth Circuit's classifications of the restraints as "matters of internal management" is nothing more than a

return to talismanic labels and outcome-determinative pigeon-holing so emphatically rejected by this Court in *Continental T.V. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977). Dispositive labelling a challenged agreement a "matter of internal management" and therefore reasonable per se represents a total repudiation of the standards of Sherman Act § 1 analysis commanded in *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 692. The classification "matter of internal management" can only be one possible conclusion upon considered analysis of the evidence after per se and rule of reason analysis is completed, not an immunity fashioned before and without any substantive antitrust analysis.

The writ should also be granted because the decision below is contrary to other decisions of this Court. Agreements between employers with monopoly power controlling and restraining the right of natural persons to pursue their trade or occupation have long been held to be one type of agreement proscribed by the Sherman Act. *Anderson v. Shipowners Assn. of the Pacific*, 272 U.S. 359, 363 (1926). Employer agreements to blacklist or boycott employees are actionable under § 1 of the Sherman Act. *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957). Dominant employers, as here, violate federal antitrust laws when they enter into agreements intended to prevent individuals from changing employers and thereby bind individuals to exclusive service to one employer. *United States v. International Boxing Club of New York, Inc.*, 358 U.S. 242 (1959). As noted in *Flood v. Kuhn*, 407 U.S. 258 at 287, n.2. (1972) (Douglas J., dissenting):

> "I use the word 'victim' in the Sherman Act sense, since a contract which forbids anyone to practice his

> calling is commonly called an unreasonable restraint of trade."

Accord, 2 Areeda & Turner, *Antitrust Law*, pp. 198-199 (1978).

Defendants' system of controls over each plaintiffs' career are such unreasonable restraints of trade. The "release" restraint prevents one employer from hiring an employee of another employer unless that other employer assents. The blacklisting agreement results in categorical refusals to deal once the individual's current employment affiliation is known. The "six months lapse" requirement, a restraint which defendants believe "contrary to the right of every individual", "blacklisting" and "illegal", enjoins negotiation and contracting until the arbitrary date is obtained. The impact on the victim is a perpetual restraint throughout his or her career.

Petitioners' action is based on centuries of tradition which have held single restraints on occupation illegal. In the *Dyers case*, 2 Hen. V, 5 pl. 26 (1415), the judge declared null and void an agreement prohibiting Dyer from pursuing his trade in a town for six months. See also, *Hilton v. Eckersley*, 6 El. and Bl. 47, aff'd 6 El. and Bl. 66. Employer boycotts and blacklisting have long been held contrary to the common law in the United States. *Oregon Steam Navigation Co. v. Winsor*, 87 U.S. 64, 67 (1894); *Huston v. Rentlinger*, 91 Ky. 333 (1891); *Mattison v. Lake Shore and M.S. Ry. Co.*, 3 Ohio Dec. (1895); *Blumenthal v. Shaw*, 77 F. 954 (3d Cir. 1897). One purpose of the Sherman Act was to condemn all restraints of trade known at common law and to give an action for compensation to those injured by the restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 51, 54-57 (1911).

The writ should also be granted to resolve a split of decisions within the circuits. In contrast to the Ninth Circuit, decisions of Circuit for the District of Columbia and the Eighth Circuit have struck down similar restraints as violative of § 1 of the Sherman Act, sustaining the right of natural persons to market and sell their services in employment markets free of unreasonable restraints. *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

E. The Decision Below on the Issue of Standing Is Contrary To Decisions of this Court

The Ninth Circuit held two categories of persons, customers and competitors, have standing to assert Sherman Act § 2 violations.

The decision below contravenes decisions of this Court. Plaintiffs were the very persons whose trade Western Electric intended to restrain by enlistment of agreements with Pacific Telephone not to employ. One goal of the restraints was to exclude actual and all potential competition in the sale of telecommunications services. This Court has held coercive practices subjecting individuals to unreasonable restraints in the market for their services to be an anticompetitive means of excluding competition in the related, separate market where their services are sold. *United States v. International Boxing Club of New York, Inc., supra*, 348 U.S. 236 (1955). See also, *Gardella v. Chandler*, 172 F.2d 402, 409 (2d Cir. 1949).

By precluding intended and actual victims from antitrust remedy against their employer, the decision below also con-

travenes the principle stated in *Mandeville Island Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948):

> "As we have recognized, the statute does not confine its protection to consumers, or to purchasers, or to competition, or to sellers . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of forbidden practices by whomever they may be perpetrated."

The decision contravenes the rule in *Radovich v. National Football League, supra*, 352 U.S. 445, 454. *Radovich* alleged he was a victim of a blacklist agreement preventing employment with any member team of the NFL. 352 U.S. at 447. The blacklist was alleged a means by which defendants monpolized professional football. 352 U.S. at 448. Recognizing Mr. Radovich's right of action under the Sherman Act, this Court said:

> " . . . this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." 352 U.S. at 454.

The decision below adds requirements beyond congressional intent which deprive petitioners of their right to trial by jury.

This Court recently reaffirmed the principles in *Mandeville* and *Radovich* in *Blue Shield of Virginia v. McCready*, ... U.S. ....., 102 S.Ct. 2540, at 2545 (1982). In *Blue Shield*, the Court said:

> "Consistent with congressional purposes, we have refused to engraft artificial limitations on the § 4 [Clayton Act] remedy." ..... U.S. ....., 102 S.Ct. at 2545.

By confining remedies for Sherman Act § 2 violations only to customers and competitors, the decision below

creates such artificial limitations which this Court has expressly rejected, and defeats public policy favoring active enforcement of the antitrust laws by natural persons.

CONCLUSION

For the reasons stated in this Petition, the writ of certiorari should be granted and the decision of the Ninth Circuit reversed.

Respectfully submitted,

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(Appendices follow)